

**FILED**  
DISTRICT COURT OF GUAM  
JAN 26 2007  
MARY L.M. MORAN  
CLERK OF COURT

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

NANYA TECHNOLOGY CORP., *et al.*,  
Plaintiffs  
vs.  
FUJITSU LIMITED, *et al.*,  
Defendants.

Civil Case No. 06-00025

**ORDER RE: OBJECTIONS TO  
MAGISTRATE'S ORDER GRANTING  
MOTION OF ALTERNATIVE  
SERVICE OF PROCESS ON  
FUJITSU LIMITED**

On January 24, 2007, this matter came before the court for a hearing on Fujitsu Limited's Objections to Magistrate's Order Granting Motion of Alternative Service of Process on Fujitsu Limited ("Fujitsu").<sup>1</sup> Fujitsu argued that the Magistrate Judge erred when he permitted Nanya Technology Corp. ("Nanya") to effect service of process on Fujitsu via electronic mail and international mail requiring a signed receipt pursuant to Rule 4(f)(3) of the Federal Rules of Civil Procedure. Having considered the parties' arguments and submissions, as well as relevant caselaw and authority, the court hereby **OVERRULES** the Fujitsu's motion and issues the following decision.

**BACKGROUND**

On September 13, 2006, the Plaintiff, Nanya filed the present action in the District Court of Guam.<sup>2</sup> The day after filing the complaint in Guam, Nanya's lawyer, Mr. Michael W. Shore,

---

<sup>1</sup>See Docket No. 19.

<sup>2</sup>Apparently when Nanya filed its complaint the parties were in the midst of longstanding settlement discussions regarding the use of various patents.

ORIGINAL

1 presented a "courtesy copy" of the complaint to Mr. Shigeru Kitano of Fujitsu during a meeting in  
2 Japan. However, there is an issue concerning why Nanya refrained from "formally serving" the  
3 complaint at that time. Nanya claims that Fujitsu asked Nanya to delay serving the complaint. *See*  
4 *Ex Parte* Motion for Alternative Process, Exhibit A, Declaration of Michael Shore ("Ex. A, Shore  
5 Decl."), ¶ 8. In contrast, Fujitsu claims that Mr. Shore assured Fujitsu representatives that Nanya  
6 would not serve the complaint so long as negotiations continued. *See* Declaration of Shigeru  
7 Kitano ("Kitano Decl."), ¶ 6. In any event, the parties appear to agree that no formal service of the  
8 complaint occurred.

9 On October 25, 2006, the parties subsequently met for another round of settlement  
10 negotiations. Ex. A, Shore Decl., ¶¶ 9-10. It was during this meeting that Fujitsu gave Nanya  
11 a copy of a complaint Fujitsu filed against Nanya in a federal district court in San Jose, California.  
12 *Fujitsu Ltd. v. Nanya Technology Corp.*, Case No. C06-06613, United States District Court for the  
13 Northern California, San Jose Division.

14 After the October 25, 2006 meeting, Mr. Shore apparently attempted to get an agreement  
15 from Fujitsu's counsel to accept service of the complaint filed in Guam. Ex. A, Shore Decl., ¶¶  
16 10-11. Counsel in the California filed case informed Mr. Shore that he did not represent Fujitsu  
17 in the Guam case and he did not know who would represent Fujitsu until the complaint was  
18 formally served in accordance with the Hague Convention. *Id.*

19 On November 9, 2006, Nanya, by its attorneys, John S. Unpingco and Joe Razzano, moved  
20 the court pursuant to Rule 4(f)(3) of the Federal Rules of Civil Procedure for an order permitting  
21 Nanya to effect service of process on defendant Fujitsu Limited ("Fujitsu") via electronic mail and  
22 international mail requiring a signed receipt. The Magistrate Judge granted the motion.  
23 *See* November 9, 2006 Order Docket No. 19.

24 On November 20, 2006, Fujitsu filed its Objections to the Magistrate's Order Granting the  
25 Motion for Alternative Service of Process on Fujitsu Limited. It is Fujitsu's objections that are  
26 now before this court.

27 ///

28 ///

DISCUSSION

Under Title 28 U.S.C. § 636(b)(1)(A), a magistrate judge may:

hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A).

“Findings and Recommendations” are issued under 28 U.S.C. § 636(b)(1)(B) concerning matters specifically excepted under 28 U.S.C. § 636(b)(1)(A). In this instance, the Magistrate Judge ruled on the issue of whether Nanya could serve the complaint via alternative service of process. The Court finds that this issue was clearly of a pretrial nature and was not identified as a dispositive matter needing a judicial referral and a Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(B).

Under Title 28 U.S.C. § 636(b)(1)(A) a district judge may reconsider a Magistrate Judge’s order on a nondispositive pretrial motion if the order was “**clearly erroneous or contrary to law**;” it is not subject to *de novo* determination as are proposed findings and recommendations under Title 28 U.S.C. § 636(b)(1)(B), (emphasis added). Similarly, Federal Rules of Civil Procedure 72(a) provides “[t]he district judge . . . shall modify or set aside any portion of the magistrate judge’s order found to be **clearly erroneous or contrary to law** . . . ” FED.R.CIV.P. 72(a) (emphasis added). Under this standard of review, the Magistrate Judge’s order should be affirmed unless the district court is left with the “definite and firm conviction that a mistake has been committed.” *Burdick v. Comm’r*, 979 F.2d 1369, 1370 (9th Cir.1992). The reviewing court may not simply substitute its judgment for that of the deciding court. *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241 (9th Cir.1991).

Fujitsu argues that the Magistrate Judge erred when he authorized service under Federal Rule of Civil Procedure 4(f)(3) because: (a) Nanya’s counsel made misrepresentations to the court concerning Fujitsu violating an agreement to continue settlement negotiations and hold off on litigation; (b) the Hague Convention does not permit service by mail by Japanese defendants; (c)

1 the form of service disregards Japanese law; (d) the safeguards in Rule 4(f)(2)(C)(ii) were not met;  
2 and (e) the Magistrate Judge's order violated the "hierarchy" of service under Rule 4 or did not  
3 satisfy Rule 4(f)(3)'s "urgency" requirement.

4 As to the first point of contention, this court recognizes that there are conflicting renditions  
5 at to whether Fujitsu asked Nanya to postpone serving the complaint or whether Nanya volunteered  
6 to hold off formally serving its complaint while settlement negotiations were on-going. This court  
7 finds that it need not resolve this factual controversy, as the issue is whether the Magistrate Judge  
8 erred in ordering alternative service.

9 Rule 4 of the Federal Rules of Civil Procedure governs service of process in civil suits. The  
10 procedural requirements for service of process on an individual found outside the United States and  
11 joined as a party against whom a claim has been made are set forth in subdivision (f) of Rule 4.  
12 Federal Rule of Civil Procedure 4(f) provides:

13 **Service Upon Individuals in a Foreign Country.** Unless otherwise provided by  
14 federal law, service upon an individual from whom a waiver has not been obtained  
15 and filed, other than an infant or incompetent person, may be effected in a place not  
within any judicial district of the United States:

16 (1) by any internationally agreed means reasonably calculated to give notice,  
17 such as those means authorized by the Hague Convention on the Service Abroad  
of Judicial and Extrajudicial Documents; or

18 (2) if there is no internationally agreed means of service or the applicable  
19 international agreement allows other means of service, provided that service is  
reasonably calculated to give notice:

20 (A) in the manner prescribed by the law of the foreign country for  
21 service in that country in an action in any of its courts of general  
jurisdiction; or

22 (B) as directed by the foreign authority in response to a letter of  
23 rogatory or letter of request; or

24 (C) unless prohibited by the law of the foreign country, by

25 (i) delivery to the individual personally of a copy of the  
summons and the complaint; or

26 (ii) any form of mail requiring a signed receipt, to be  
27 addressed and dispatched by the clerk of the court to the party to be  
served; or

28 (3) by other means not prohibited by international agreement as may be  
directed by the court.

1 FED.R.CIV.P. 4(f)(emphasis added).

2 Fujitsu claims that since Japan is a signatory to the Hague Convention (the "Convention"),  
3 the procedures as set forth under the Convention for process of service must be followed.<sup>3</sup> See  
4 FED.R.CIV.P. 4(f)(1). However,

5 [t]he Convention also provides that it does not "interfere with" other methods of  
6 serving documents. Article 10(a) of the Convention recites:

7 Provided the State of destination does not object, the present  
8 Convention shall not interfere with-

9 (a) the freedom to send judicial documents, by postal  
10 channels, directly to persons abroad.

11 *Brockmeyer v. May*, 383 F.3d 798, 801 (9<sup>th</sup> Cir. 2004).

12 In this instance, the question is whether the Hague Convention prohibits service by mail.  
13 Admittedly, the law is unsettled regarding whether service via postal channels is permissible  
14 against Japanese defendants under the Hague Convention. Fujitsu however, says the better view  
15 is that it is not. However, in *Brockmeyer*, the Ninth Circuit held that the meaning of "send" by mail  
16 in Article 10(a) of the Hague Convention includes "serve" by mail. The Ninth Circuit stated that  
17 its holding is consistent with the purpose of the Convention to facilitate international service of  
18 judicial documents. *Id.* at 802. The *Brockmeyer* court continued:

---

19 <sup>3</sup> The Hague Convention, ratified by the United States in 1965,  
20 regularized and liberalized service of process in international civil  
21 suits. The primary means by which service is accomplished under  
22 the Convention is through a receiving country's "Central  
23 Authority." The Convention affirmatively requires each member  
24 country to designate a Central Authority to receive documents  
25 from another member country. See Hague Convention, art. 2. The  
26 receiving country can impose certain requirements with respect to  
27 those documents (for example, that they be translated into the  
28 language of that country). See *id.*, art. 5. If the documents comply  
with applicable requirements, the Convention affirmatively  
requires the Central Authority to effect service in its country. See  
*id.*, arts. 4 & 5.

19 *Brockmeyer v. May*, 383 F.3d 798, 801 (9<sup>th</sup> Cir. 2004).

1 The purpose and history of the Hague Convention, as well as the position of the  
2 U.S. State Department, convince us that "send" in Article 10(a) includes "serve."  
3 We therefore hold that the Convention permits-or, in the words of the Convention,  
4 does not "interfere with"-service of process by international mail, so long as the  
5 receiving country does not object.

6 *Id.* at 803.

7 Fujitsu concedes that Japan has not objected to Article 10(a) and that there is a split of  
8 authority on the issue. *See* Fujitsu's Memorandum, Docket No. 44, at 7. Other courts considering  
9 the issue have found that service on a Japanese defendant by mail is proper under the Convention:

10 As evidenced by the split among the judges of this Court, there is no obviously right  
11 or wrong answer to the question. After careful review, this Court adopts the view  
12 that Article 10 does permit service of process by mail. In doing so, the Court  
13 follows the United States Supreme Court's directive that "[t]reaties are construed  
14 more liberally than private agreements, and to ascertain their meaning we may look  
15 beyond the written words to the history of the treaty, the negotiations, and the  
16 practical construction adopted by the parties."

17 *Schiffer v. Mazda Motor Corp.* 192 F.R.D. 335, 337 -338 (N.D.Ga.,2000) (citations omitted).

18 According to the Practical Handbook on the Operation of the Hague Convention of  
19 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents  
20 in Civil or Commercial Matters (1983) ("Handbook"), 'Japan has not declared that  
21 it objects to service through postal channels.' Handbook, at 112. Accordingly, under  
22 Article 10(a), service on KHI, a Japanese corporation, was effective by the direct  
23 mail procedure. . . .

24 *Weight v. Kawasaki Heavy Industries, Ltd.*, 597 F.Supp. 1082, 1085 (D.C.Va.,1984).

25 In light of the fact that the Convention "purports to deal with the subject of service  
26 abroad .... [t]he reference to 'the freedom to send judicial documents by postal  
27 channels, directly to persons abroad' would be superfluous unless it was related to  
28 the sending of such documents for the purpose of service."

29 *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 463 (E.D.N.Y.,1986) (citations omitted).

30 Even after a number of courts have upheld service by mail on Japanese parties, Japan still  
31 has apparently not objected to Article 10(a). *Schiffer*, 192 F.R.D. at 338 ("Numerous United States  
32 courts have upheld service of process on Japanese defendants by direct mail, yet the Japanese  
33 government has made no efforts to amend its objections to the Convention so as to preclude service  
34 by mail pursuant to Article 10(a)").

35 Fujitsu next argues that this court should consider Japanese laws of service. Apparently,  
36 Japanese plaintiffs are not able to effect service themselves by mail under their civil law. With  
37 regard to service through a special mailing process, persons engaged in the mailing business known  
38



1 as *tokubetsu sotatsu* are deemed to be the official authorized to effecting such service.  
2 See Fujitsu's Memorandum, Docket No. 44, at 9. There are certain procedures and reporting  
3 requirements that must be followed. *Id.* While there may be strict and formal procedures for  
4 effectuating service in Japan, it is of little consequence to this court's determination. As noted, the  
5 only concern for this court is whether the Magistrate Judge erred by allowing service by mail. The  
6 Ninth Circuit has clearly held that such service is not prohibited by the Hague Convention.  
7 *Brockmeyer*, 383 F.3d at 802.

8 Fujitsu argues that the court should at least require the safeguards as provided for in  
9 FED.R.CIV.P. 4(f)(2)(C)(ii). That rule provides, in relevant part:

10 (f) [S]ervice . . . may be effected in a place not within any judicial district of the  
11 United States:

12 ...

13 (2) if there is no internationally agreed means of service or the applicable  
14 international agreement allows other means of service, provided that service is  
15 reasonably calculated to give notice:

16 ...

17 (C) unless prohibited by the law of the foreign country, by

18 ...

19 (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk  
20 of the court to the party to be served[.]

21 FED.R.CIV.P. 4(f)(2)(C)(ii).

22 Again, however, under the circumstances there is no requirement that the method of service  
23 under FED.R.CIV.P. 4(f)(2)(C)(ii) be used. Within the strictures of Rule 4(f) there are three  
24 separate methods through which service of process "may be effected in a place not within any  
25 judicial district of the United States." FED.R.CIV.P. 4(f)(2). In the opinion of *Rio Properties, Inc.*  
26 *v. Rio International Interlink*, 284 F.3d 1007, 1014-15 (9th Cir.2002), the Ninth Circuit Court of  
27 Appeals held that each of Rule 4(f)'s three methods for international service of process is equivalent  
28 to one another. That is, "Rule 4(f) does not denote any hierarchy or preference of one method of  
service over another." *Id.* at 1015. Further, "Rule 4(f)(3) is not subsumed within or in any way  
dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing." *Id.* Thus,  
"court-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1) or

1 Rule 4(f)(2).” *Id.* Fujitsu argued that the *Rio* court’s holding applies only to situations where the  
2 recipient party does not live in a member country of the Hague Convention. The *Rio* Court  
3 however, does not make that kind of distinction nor limit its holding to such circumstances.

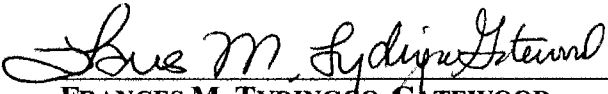
4 Although Fujitsu claims that Rule 4(f)(3) can only be availed upon in “urgent  
5 circumstances” there is no such indication upon reading the caselaw. Nevertheless, Nanya alleged  
6 circumstances suggesting that it was urgently trying to effectuate service to prevent Fujitsu’s  
7 alleged unjust gamesmanship and forum shopping by filing a duplicative action in California. But  
8 again, the Ninth Circuit court in *Rio* stated that “we are left with the inevitable conclusion that  
9 service of process under Rule 4(f)(3) is neither a ‘last resort’ nor ‘extraordinary relief.’” *Rio*  
10 *Properties, Inc.*, 284 F.3d at 1015 (9<sup>th</sup> Cir. 2002).

11 We should not lose sight of what service of process is about, it is about giving a party notice  
12 of the pendency of an action and the opportunity to respond. *Rio Properties, Inc. v. Rio*  
13 *International Interlink*, 284 F.3d 1007, 1017 (9<sup>th</sup> Cir. 2002). All that is required under Rule 4(f)(3)  
14 is that service be “directed by the court” and that the means of service “not be prohibited by  
15 international agreement [the Hague Convention].” FED.R.CIV.P. 4(f)(3). There can be little  
16 question that the means by which the Magistrate Judge ordered Nanya to provide service was  
17 sufficient enough to give Fujitsu notice and an opportunity to respond. The Magistrate Judge’s  
18 Order was neither clearly erroneous nor his legal conclusions contrary to law. Accordingly,  
19 Fujitsu’s Objections are overruled.

#### 20 CONCLUSION

21 Under the circumstances, the court finds that the Magistrate Judge’s Order Granting Motion  
22 of Alternative Service of Process on Fujitsu Limited was proper. This court finds no basis to  
23 sustain Fujitsu’s objections as the order was neither clearly erroneous nor the legal conclusions  
24 therein contrary to law. Accordingly, the court **HEREBY OVERRULES** Fujitsu’s objections.

25 SO ORDERED this 25<sup>th</sup> day of January, 2007.

26  
27   
28 **FRANCES M. TYDINGCO-GATEWOOD**  
Chief Judge  
District Court of Guam